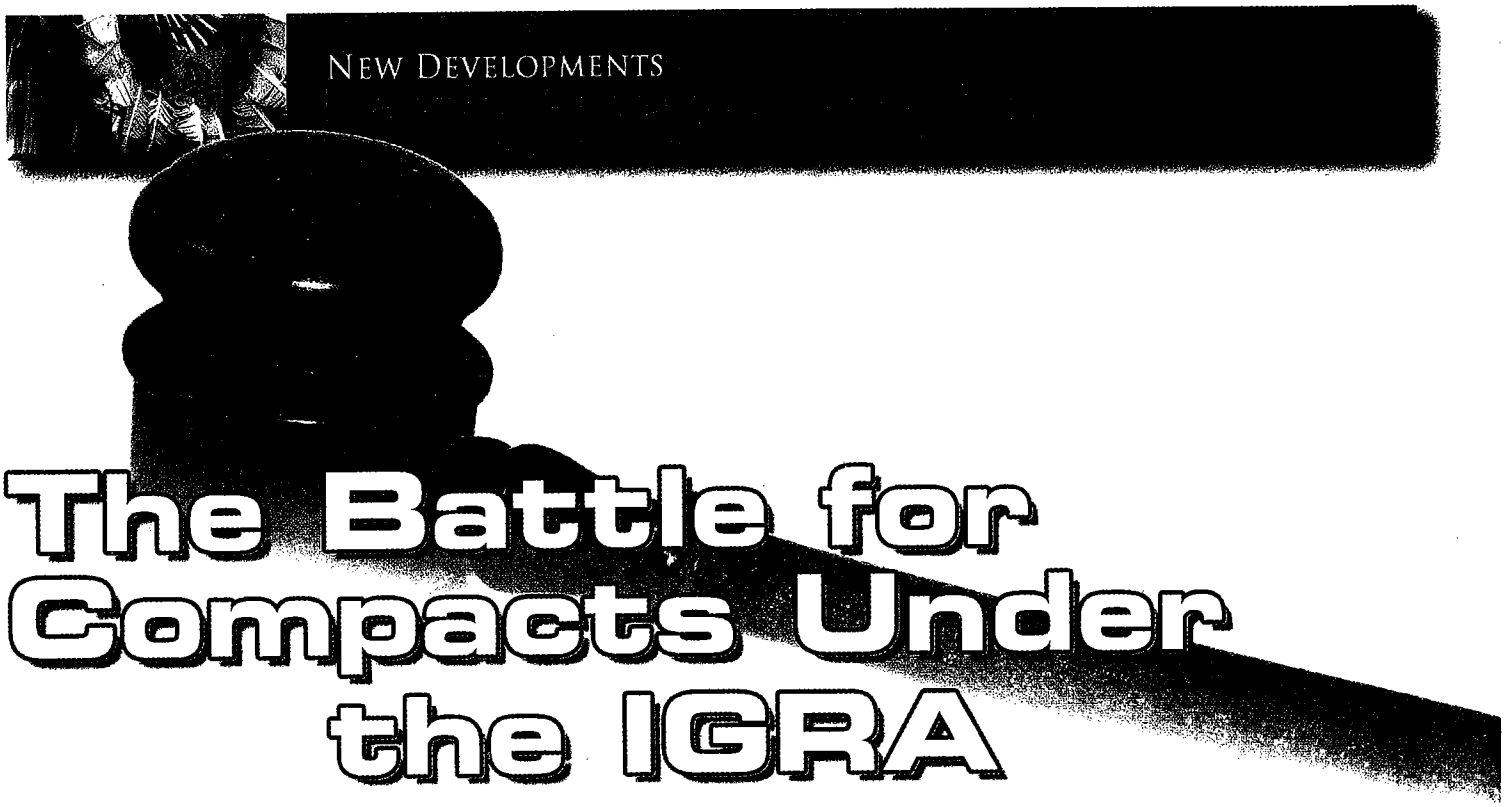

The Battle for Compacts Under the IGRA

By Heidi McNeil Staudenmaier

Prior to the passage of the Indian Gaming Regulatory Act (IGRA) in 1988, the term "compact" had little application outside governmental functions involving agreements between states and similar sovereign entities. These days, compacts entered into between Indian tribes and states for tribal gaming operations have equated to substantial revenues for both tribes and states.

The IGRA requires that a gaming compact be negotiated between the tribe and the state if the tribe wants to engage in Class III gaming (essentially anything other than Bingo, such as slot machines, table games or other "Las Vegas-style" gaming). A compact is designed to govern the scope of gaming, civil/criminal jurisdiction, regulation and related issues. The IGRA prohibits a state from "taxing" tribal casinos through the compact provisions; however, revenue-sharing agreements have been permitted where the tribe is given something in exchange, such as gaming exclusivity, unlimited compact duration or similar favorable provisions.

Each state has taken a different approach to negotiating compacts. Some have essentially agreed to unlimited gaming by the tribes with little or no state involvement in the regulation (e.g., Michigan). In contrast, other states have negotiated specific gaming limitations with extensive regulatory oversight (e.g., Arizona).

Many states initially refused to negotiate compacts with tribes. However, slowly, through considerable litigation and other pressures, most of these states ultimately agreed to negotiate compacts. Indeed, much of states' changes in attitude have been the result of the huge financial success story of Tribal Gaming.

Specifically, in 2006, tribal casinos generated $25.7 billion in gross revenue from gaming activities and an additional $3.2 billion in gross revenue from related hospitality and entertainment services (i.e., resorts, hotels, restaurants, golf, entertainment complexes, travel centers, etc.). Of this amount, $2.4 billion has been paid in revenue-sharing and regulatory payments to states as a result of deals struck through the gaming compacts. Local governments also have garnered more than $100 million in payments from tribal casinos.

Indeed, a number of states facing budget problems over the last few years have tried to utilize revenue-sharing provisions in new, renegotiated or amended compacts to help ease the financial situation. For example, earlier this year, many of the New Mexico gaming tribes agreed to compact amendments with the state whereby, among other things, the revenue-sharing provisions were altered somewhat to the state's benefit. In exchange, the tribes now have compacts with a 30-year duration (until 2037), as well as provisions assuring their exclusivity to a certain extent.

Florida has been a battleground for tribal gaming since before the passage of IGRA. The Seminole Tribe of Florida was initially involved in litigation that ultimately paved the way for the IGRA. Then, once the IGRA became law, the Seminole immediately pressed Florida's governor for a compact. For various reasons, the governor refused to negotiate a compact. The Seminole brought suit against the state, which went all the way to the United States Supreme Court. The High Court, however, ruled that tribes could no longer sue states in federal court, as the 11th Amendment of the Constitution gave states sovereign immunity protection. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

The Seminole then pressed the United States Secretary of the Interior to issue "procedures" allowing Class III gaming as permitted under the IGRA as an alternative to a state-negotiated compact. Litigation again ensued over the secretarial procedures. Things stalled when the tribe was able to successfully parlay its Class II casino into a multi-million dollar success.

With a new governor (Republican Charlie Crist) taking the helm in 2006, the Seminole again pursued a compact. This time, the negotiations were much more favorable to the tribe. At the time this article was written in mid-September, the long-awaited compact was expected any day. But even if the tribe is able to secure an executed compact with the governor, the State Legislature will likely need to ratify the compact in order for it to be effective under state law. A heated battle in the Legislature is anticipated, although the revenue-sharing provisions in the compact will certainly serve as considerable leverage in a state facing a budget crunch. The proposed deal purportedly would give the state a minimum of $100 million in annual revenue, and perhaps as much as $200 million. How and when the Florida battle will finally be resolved is unknown at this point.

On the other coast, yet another intensive compact battle is brewing. The California battle is not simply tribe vs. state. Rather, this fight involves tribes vs. unions, race tracks and even other tribes.

In 1999, in the waning hours of the year's legislative session, the initial California compacts were approved — but without any revenue-sharing provisions. As the California Tribal Gaming market quickly developed, the state recognized the lost revenues and a number of tribes located in the more lucrative locations (i.e., near urban centers) determined that they could handle even more slot machines than they were permitted under the 1999 compacts. Thereafter, several California tribes sought compact amendments permitting additional slot machines in exchange for certain revenue-sharing and other provisions sought by the state. The bulk of the tribes, however, continued to operate under the 1999 compact until several of the larger tribes unsuccessfully sought compact amendments in 2006 that would have provided for additional slot machines in exchange for revenue-sharing provisions. The 2006 amendment proposals, however, were viewed by some as not as favorable to the state as the earlier amendments. These proposed amendments failed in the last minutes of the 2006 legislative session.

Not willing to give up, the compact amendments were again pursued in 2007, this time successfully. The Agua Caliente Band, Pechanga Band, Morongo Band, Sycuan Band and San Manuel Band secured legislative ratification of new compacts permitting as many as 5,500 additional slot machines to each with extended terms of 23 years. In return, the state will receive payments of 15 to 25 percent of the profits from the new machines — possibly equating to hundreds of millions of dollars each year.

No sooner had the ink dried on the legislative ratification than the opposition commenced signature-gathering with hopes of forcing a public vote in February seeking to undo the deals. Driving the referendum petition effort are unions and race tracks. Several tribes that had entered into earlier compact amendments have also provided funding to support the referendum effort. If enough valid signatures are gathered by the Oct. 5 deadline, these new compact amendments will be on the public ballot on Feb. 5. In the meantime, the compacts are set to become state law as of Jan. 1, 2008. They are not deemed to be effective, however, until approved by the Secretary of the Interior. If the signature-gathering is successful, it is anticipated that the secretary will not take any action on the compact amendments until after the February vote. Like the Florida situation, the fate of these California compact amendments was unknown when this article was written.

In sharp contrast, the road to the Washington compact amendments was less rocky, with the new deals becoming effective earlier in 2007.

Because 2008 is a presidential election year with potential for a political shift, it is possible that further compacting activities (both pro and con) will take place. At least one new tribal gaming jurisdiction is expected to come online, with the Mashpee Wampanoag Tribe in Massachusetts finally earning federal recognition in 2007. Hang on for the never-ending tribal gaming roller coaster ride as the IGRA gets ready to celebrate its 20th anniversary next year.

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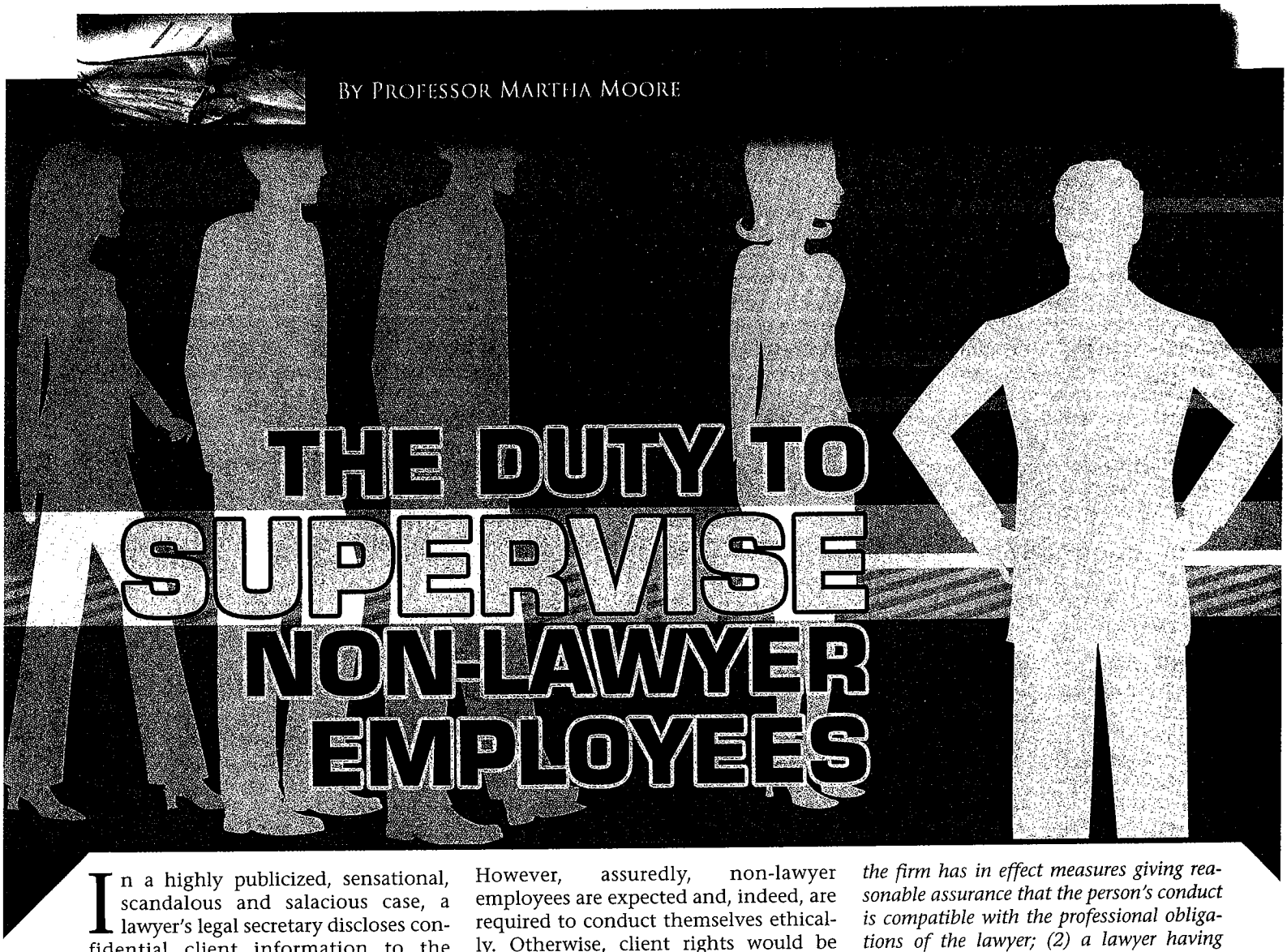

BY PROFESSOR MARTHA MOORE

THE DUTY TO SUPERVISE NON-LAWYER EMPLOYEES

In a highly publicized, sensational, scandalous and salacious case, a lawyer's legal secretary discloses confidential client information to the media. This confidential client information thereafter becomes the subject of frenzied media scrutiny. As a non-lawyer, the legal secretary is *not* subject to the scrutiny of attorney disciplinary authorities. On the other hand, the client's lawyer had no hand in the disclosure of the confidential client information. So who is responsible for the breach of client confidentiality?

Obviously, lawyers must practice law within ethical limits, under the ever-vigilant and probing eyes of attorney disciplinary authorities. But, who is responsible for the ethical behavior of non-lawyer employees? Typical law offices are staffed by a number of non-lawyers: paralegals, secretaries, investigators, mailroom personnel, accountants, runners and office managers, to name a few. Presumably, this group is unfamiliar with the attorney rules of professional responsibility.

However, assuredly, non-lawyer employees are expected and, indeed, are required to conduct themselves ethically. Otherwise, client rights would be trampled. Moreover, ethical rules would be rendered a nullity if the conduct of non-lawyer employees escaped scrutiny.

Decisively, it is the responsibility of lawyers to ensure that their non-lawyer employees act in compliance with the professional obligations of lawyers. Specifically, lawyers who supervise or manage non-lawyer employees *are responsible* for ensuring that these employees understand the ethical rules applicable to lawyers and that they conduct themselves accordingly.

American Bar Association Model Rule 5.3 provides that:

With respect to a non-lawyer employed or retained by or associated with a lawyer: (1) a partner, and a lawyer who individually or together with other lawyers, possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; (2) a lawyer having direct supervisory authority over the non-lawyer shall take reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (3) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (A) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (B) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Supervising and managing lawyers cannot passively hire, to all appearances, competent office personnel and assign tasks with no ongoing lawyer oversight. To the contrary, lawyers must be actively

involved in the supervision of non-lawyer employees.

Oftentimes, lawyers erroneously and ominously assume that non-lawyer office personnel, even long-term non-lawyer employees, are knowledgeable of the professional obligations of lawyers. Such assumptions are imprudent. Moreover, the lawyer who operates under such precarious assumptions places his or her license to practice law in substantial jeopardy.

A lawyer is responsible for the ethical violations of non-lawyer employees if the overseeing lawyer orders or ratifies conduct by non-lawyer employees. Fittingly, lawyers cannot circumvent the ethical rules by ordering or ratifying unethical actions by non-lawyer employees. The supervising lawyer is also responsible for the ethical violations of non-lawyer employees if the lawyer learns of conduct by non-lawyer employees but fails to take reasonable remedial action. Under these circumstances, lawyers must not bury their heads in the proverbial sand. Rather, lawyers are obliged to take appropriate action to protect clients.

Notably, a lawyer is *not* responsible for a non-lawyer employee's ethical violations if the lawyer demonstrates compliance with ABA Model Rule 5.3. Although lawyers are held to high ethical standards, they are not strictly liable for all unethical conduct committed by their employees. Nonetheless, it is essential that lawyers maintain evidence of compliance in this regard. Prudent lawyers should routinely require non-lawyer employees to execute oaths of confidentiality, for example. Such written documents, executed by non-lawyer employees, are persuasive evidence of the lawyer's compliance with ABA Model Rule 5.3.

While lawyers are ultimately responsible for educating non-lawyer employees, lawyers are not required to personally educate non-lawyer employees. Indeed, there are numerous seminars, conferences, lectures, etc., in which non-lawyer employees can participate to obtain the requisite education and training. Again, lawyers should substantiate the non-lawyer employees' education and training by securing appropriate certificates of completion as further evidence of compliance with ABA Model Rule 5.3.

Alarmingly, many non-lawyer employees, some of whom have worked at reputable, prestigious law firms for several years, have never been educated about the professional obligations of lawyers. Needless to say, the lawyers in these offices are playing a dangerous game of Russian Roulette with their licenses to practice law and their reputations.

So who is responsible for that breach of client confidentiality? The lawyer is responsible for the legal secretary's disclosure of confidential client information if he or she failed to educate the secretary about the ethical duty of confidentiality. The lawyer is also responsible for the leaked confidential information if he or she ordered or ratified the secretary's disclosure of the information or learned about the disclosure but failed to take reasonable remedial action.

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